Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1046

CASPAR W. WEINBERGER,

Appellant

—v.—

SANTIAGO DIAZ, JOSE A. CLARA and
VICTOR CARLOS ESPINOSA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT FILED JANUARY 3, 1974
PROBABLE JURISDICTION NOTED MAY 13, 1974

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Appellant

—v.—

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 72-1312—Civ.—JLK

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1972	
Aug. 18	Complaint. 3 JUDGE COURT REQUESTED
31	Ltr. & ORDER: Designation of three judge court: C. B. Fulton; J. Eaton and D. D. Dyer. (8/29/72-John R. Brown, Chief Judge 5th Circuit)
Sept. 7	ORDER: Order dated Aug. 29, 1972 Supersedes in part to D. W. DYER; J. EATON & JAMES LAWRENCE KING. (9/5/72 J.R. Brown, Chief Judge 5th Circuit).
25	Motion To Add Parties Pltf. and to File an Amended Complaint and Memo of Law in Support, by Pltfs.
Sept. 28	First Amended Complaint. (Pltfs.)
Sept. 28	ORDERED: Motion to add Parties Pltf. CLARA & ESPINOSA is GRANTED. ORDERED: Motion to File a First Amended Complaint is GRANTED & deemed filed as of the date hereof. Clerk to re-style the cause. (9-28-72-JLK).
Oct. 24	Motion to dismiss. (U.S.A.)
24	Memo of law in support of Deft's motion to dismiss for failure to state a claim and opposition to convening of a 3-Judge Court and to Pltfs. request for injunctive relief
24	Affidavit of H. Dale Cook.
16	ORDER: Motion to proceed in forma pauperis is Granted. (10/13/72-JLK) as to Jose A. Clara.

Date	PROCEEDINGS
1972	
16	Motion & Order to Proceed In Forma Pauperis. (JLK-10/13/72)
25	Motion to Dismiss. (Deft.)
Nov. 10	Memo of law in opposition to motion to Dismiss. (Pltfs.)
20	Motion to Dtermine the Class, by Pltfs.
20	Memo of Law in Support of Motion to Determine the Class, by Pltfs.
21	Supplementary Memo of Law in Support of Deft's Motion to Dismiss and/or for Summary Judgment and in Opposition to Pltf's Memo of Law in Opposition to Motion to Dismiss, by Defts.
21	Affidavits of Manuel Levine, Bureau of Health Insurance of the Social Security Administration on behalf of the Gov't., concerning claim folders of Pltfs.
22	*ORDERED* (1) Deft's Motion to Dismiss is DENIED. (2) Pltfs shall submit their brief on the merits within 14 days. (3) Deft. shall submit his response within 14 days of service of pltfs' brief. (4) Pltf shall have 5 days within which to answer. (JLK-JE-DD-11/22/72)
28	Supplemental Memo of Law in Support of Deft's Motion to Dismiss and/or for Summary Judgment and in Opposition to Pltf's Memo of Law in Opposition to Motion to Dismiss, by DEFT.
Dec. 4	Transcript of deft's Motion to Dismiss on 11/22/72 @ 2:00 PM before a 3 Judge Court consisting of David W. Dyer, Joe Eaton and James Lawrence King. (pages 1-44—one volume).
11	Motion for Summary Judgment. (Pltfs.).

Date	PROCEEDINGS
1972	
11	Memo in Support of Pltfs.' Motion for Summary Judgment.
27	Memo of Law in Support of Deft.'s Motion for Summary Judgment and in Opposition to Pltf.'s Motion for Summary Judgment. (Deft.).
1973	
Jan. 16	Reply Memo to Deft.'s Memo of Law in Support Deft.'s Motion for Summary Judgment and In Opposition to Pltfs.' Motion for Summary Judgment. (Pltf.).
22	Affidavit of Santiago Diaz.
22	Affidavit of Jose A. Clara.
Mar. 14	Motion to Substitute Party Deft. and Memo in Support Thereof. (Pltfs.).
30	ORDER SUBSTITUTING PARTY DEFT.: ORDERED that Casper Wineberger is substituted for Elliot Richardson as the named Party Deft. and the Clerk of the Court is directed to re-style the cause accordingly. (3/29/73-JLK-R#120).
June 11	Memo Opinion. (6/11/73-JLK).
20	Motion for Stay and Memo in Support of Motion. (Deft. USA).
21	ORDER: ORDERED that Deft.'s Motion for Stay is GRANTED for a period of 50 days. (6/21/73-JE for JLK).
29	Motion to Vacate Order Granting Defts.' Motion to Stay and Memo in Support Thereof and Memo in Opposition to Defts.' Motion to Stay. (Pltfs.).
July 23	Motion for Entry of Judgment. (Deft.).

Date	PROCEEDINGS
1973	
Aug. 7	ORDER: Pltfs.' motion to vacate the stay entered by the Court on 6/21/73, is vacated. ORDERED that Deft.'s Motion for entry of Final Judgment is GRANTED. (8/7/73-DD-JE-JLK).
7	FINAL JUDGMENT: ORDERED that Pltfs.' Motion for Summary Judgment and their prayer for final declaratory and injunctive relief on behalf of themselves and the class and sub-class certified is GRANTED and Deft.'s Motion for Summary Judgment is DENIED in accordance with the court's memo opinion of 6/11/73, and for the reasons set forth therein. (8/73-DD-JE-JLK-R#123).
10	Motion for Stay Pending Appeal to the U.S. Supreme Court. (Deft.)
16	Letter from U.S. Attorney to Judge King, Re: Santiago Diaz, et al V. Caspar W. Weinberger, etc. Appropriate provisions Fed. Rules Of Civil Procedure. (Clemens Hagglud, Chief Civil Div.)
16	Memorandum In Opposition To Defts' Motion For Stay Pending Appeal. (Atty. for Pltfs'—Legal Services of Greater Miami, Inc.)
21	ORDER Denying Stay Pending Appeal. Defts. Motion for Issuance of a Stay Pending Appeal to the United States Supreme Court be and the same is hereby DENIED. (8/17/73-JLK)
Sept. 4	ORDER Correcting Clerical Errors. (8/30/73-JLK).
6	Notice of Appeal by the United States of America from the order dated 8/7/73. (Copies to Judges Eaton and King. Alfred Feinberg, U.S.C.A. and Court Reporter).

CLERK'S CERTIFICATE

Certified to be a true and correct copy of the original.

JOSEPH I. BOGART
Clerk
U. S. District Court
Southern Dist. of Fla.

By /s/ R. I. Greene
Deputy Clerk
Date: 10/10/23

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 72-1312-Civ-JLK

[Title Omitted]

[Filed Aug. 18, 1972]

COMPLAINT

(CLASS ACTION)

(Three Judge Court)

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1361 and/or 5 U.S.C. § 701 et seq. and/or 28 U.S.C. § 1331 and/or 42 U.S.C. § 405(g). This action seeks to review a decision of the Social Security Administration, a Division of the Department of Health, Education and Welfare, rejecting Plaintiff's application for Health Insurance for the Aged (Medicare), and to compel the Secretary to enroll Plaintiff in the Medicare Program. This action further seeks redress of a violation of the rights, privileges and immunities of the Plaintiff secured by the Fifth Amendment to the United States Constitution, as also to enjoin the enforcement of, and pursuant to 28 U.S.C. § 2201, to declare unconstitutional 42 U.S.C. § 1395o.(2)(A)(i) and (ii) requiring as an eligibility requirement for Health Insurance for the Aged either citizenship or lawful admission for permanent residence in the United States continuously during the five (5) years immediately preceding the month of application for enrollment. Plaintiff's inability to meet the eligibility requirements under constitutional attack herein has deprived and will deprive him of more than $10,000 (Ten Thousand and 00/100 Dollars) worth of medical benefits to which he would otherwise be entitled without cost under the Medicare Program.

2. Plaintiff seeks a preliminary and permanent injunction restraining the enforcement, operation and execution of an Act of Congress, to wit: 42 U.S.C. § 1395o.(2)(A)(ii), for repugnance to the Constitution of the United States. Accordingly, pursuant to 28 U.S.C. § 2282 Plaintiff's claim must be heard and determined by a District Court of three Judges composed pursuant to the requirements of 28 U.S.C. § 2284.

3. On or about June 18, 1972 Plaintiff applied for enrollment under the Congressionally created Health Insurance Plan for the Aged, 42 U.S.C. § 1395 et. seq. Plaintiff is an alien lawfully admitted to the United States who has not resided therein continuously during the five (5) years immediately preceeding the month in which he applied for enrollment. Except for Plaintiff's alienage and his failure to continuously reside in the United States for a period of five (5) years immediately preceeding the month in which he applied for enrollment in the Medicare Program, Plaintiff is fully qualified for enrollment in said Program. On August 4, 1972 Plaintiff received a formal letter of rejection for having "not resided in the United States for a required period of time." (See Exhibit "A" attached hereto and made a part hereof).

CLASS ACTION ALLEGATIONS

4. This is a class action pursuant to Rule 23(b)(2) F.R.C.P. This class which Plaintiff represents consists of all persons in the United States who have been or will be denied enrollment under the Medicare Program, 42 U.S.C. § 1395 et seq. because of their failure to meet the citizenship and residency requirements of 42 U.S.C. § 1395o.(2)(A)(i) or (ii). The class is so numerous that joinder of all members is impracticable. Defendant has refused to act on grounds generally applicable to Plaintiff's class thereby making appropriate final injunctive and/or corresponding declaratory relief with respect to the class. There are questions of law and fact common to the class. The claims of the Plaintiff are typical of the claims of the members of the class and

Plaintiff will fairly and adequately protect the interests of the class.

5. Sec. 1395o.(2)(A)(i) and (ii) of 42 U.SC. is unconstitutional in that it denies the equal protection of the laws of the United States to aliens who are otherwise qualified and eligible for Medicare benefits.

6. Plaintiff has no viable or available administrative remedies; Plaintiff has no adequate remedy of law.

WHEREFORE, and for the foregoing reasons, Plaintiff respectfully prays as follows:

(a) That this Court assume jurisdiction of this cause pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 405(g), 28 U.S.C. § 1361 and/or 5 U.S.C. § 701.

(b) That this Court will enter an order determining the class to be all persons denied enrollment in the Health Insurance Program for the Aged (Medicare) solely on account of their alienage and their failure to continuously reside in the United States for five (5) years immediately preceeding the month of their application for enrollment.

(c) That this Court enter a declaratory judgement pursuant to 28 U.S.C. § 2201 declaring that 42 U.S.C. § 1395o.(2)(A)(i) and (ii) is unconstitutional and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

(d) That the Court enter a Preliminary Injunction requiring the Defendant to forthwith approve all applicants for enrollment in the Medicare Program who have been denied eligibility solely for failing to comply with 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(e) That the Court enter a permanent injunction ordering the Defendant to enroll all applicants for Medicare whose applications have been denied solely by reason of their having failed to comply with the requirements of 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(f) That the Court order such appropriate and further relief as to this Court seems just.

Respectfully submitted,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiff
LEGAL SERVICES OF GREATER MIAMI, INC.
395 Northwest First Street, Suite 202
Miami, Florida 33128
Telephone—379-0822

LEGAL SERVICES OF GREATER MIAMI, INC.

ADMINISTRATIVE—CULMER OFFICES
395 N.W. 1st Street
Miami, Florida 33128
Suite 202
Telephone 379-0822

Leo Adderly, Esq.
President

(Area Code 305)

Howard W. Dixon, Esq.
Executive Director

[SEAL]

September 20, 1972

Clerk, United States District Court
300 N.E. First Avenue
Miami, Florida

RE: *Diaz* v. *Richardson*
Case No. 72-1312-Civ-JLK

Dear Sir:

Enclosed please find Exhibit "A" which should have been attached to the Complaint filed in the above-styled cause but was not through inadvertence on our part.

Please be kind enough to deliver Exhibit "A" to the Judge for attachment to the Complaint in the Court's file.

Very truly yours,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiff

Ahp

Enclosures

cc: Raymond B. Ray
United States Attorney

Elliot Richardson, Secretary
Department of Health, Education
and Welfare

[SEAL]

EXHIBIT "A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Payment Center
Birmingham, Alabama 35203

Refer To Claim Number
267-29-2044 Santiago Diaz

Bureau of Retirement
and Survivors Insurance

August 4, 1972

Santiago Diaz
3690 NW 14 Ter
Miami, FL 33125

This refers to your claim for benefits under the Social Security Act.

You are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A person not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance.

If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the decision made on your claim.

If you have any questions about your claim, you should get in touch with any social security office. Most ques-

tions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. R. Elder
C. R. ELDER
Chief, Claims Authorization Branch

Enclosure:
SSI-58

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

John R. Brown
Chief Judge
Houston, Texas 77002

August 29, 1972

Joseph I. Bogart, Clerk
Southern District of Florida
P. O. Box 669
Miami, Florida 33101

No. 72-1312-Civ-JLK—Diaz v. *Richardson*

My dear Mr. Bogart:

In response to the request of Judge Fulton, I have constituted the Court in accordance with the enclosed designation order which I request you to file. I also enclose the pleadings, in reference to this matter, which were sent to me by Judge Fulton.

Copies of this order are being sent to the Judges.

Sincerely yours,

/s/ John R. Brown
JOHN R. BROWN

Enclosures

cc: Hon. David W. Dyer
Hon. Charles B. Fulton
Hon. Joe Eaton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER—DESIGNATION OF THREE JUDGE COURT

(1) Requesting Judge: Honorable Charles B. Fulton
Southern District of Florida

(2) District Judge: Honorable Joe Eaton
Southern District of Florida

(3) Circuit Judge: Honorable David W. Dyer
Southern District of Florida

(4) Date of Order: August 29, 1972

[Filed August 31, 1972]

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such ques-

tions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

AMENDMENT TO ORDER DESIGNATING
THREE JUDGE COURT

[Filed September 7, 1973]

This order supersedes in part my order of August 29, 1972, constituting a 3-Judge Court in this case.

With the concurrences of all of the Judges concerned, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby reconstitute the 3-Judge Court to hear and determine this case as follows:

Honorable David W. Dyer
United States Circuit Judge

Honorable Joe Eaton
United States District Judge
Southern District of Florida

Honorable James Lawrence King
United States District Judge
Southern District of Florida

Entered this 5th day of September, 1972.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

FIRST AMENDED COMPLAINT

(CLASS ACTION)

(Three Judge Court)

[Filed September 20, 1972]

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1361 and/or 5 U.S.C. § 701 et seq. and/or 28 U.S.C. § 1331 and/or 42 U.S.C. § 405(g). This action seeks to review a decision of the Social Security Administration, a Division of the Department of Health, Education and Welfare, rejecting applications of Plaintiffs DIAZ and CLARA, for Health Insurance for the Aged (Medicare), for failing to meet citizenship or residency requirements, and to compel the Secretary of the Department of Health, Education and Welfare to enroll Plaintiffs, DIAZ and CLARA in the Medicare Program.

This action seeks redress by the Plaintiffs, ESPINOSA, DIAZ and CLARA for the denial of equal protection of the laws, specifically the denial of liberty without due process of law secured to Plaintiffs by the Fifth Amendment to the United States Constitution, as also, to enjoin the enforcement of, and pursuant to 28 U.S.C. § 2201, to declare unconstitutional the eligibility provision of the Health Insurance Plan for the Aged, 42 U.S.C. § 1395o-.(2)(A)(i) and (ii), requiring either citizenship or permanent resident status and continuous residence in the United States during the five (5) years immediately preceeding the month of application for enrollment.

Plaintiffs' inability to meet the eligibility requirements, under constitutional attack herein, has and will result in the deprivation to each of them of more than $10,000.00 (Ten Thousand and 00/100 Dollars) worth of medical benefits to which they would otherwise be entitled without cost under the Medicare Program.

2. Plaintiffs seek a preliminary and permanent injunction restraining the enforcement, operation and execution of an Act of Congress, to wit: 42 U.S.C. § 1395o.(2)(A)(i) and (ii) for repugnance to the Constitution of the United States. Accordingly, pursuant to 28 U.S.C. § 2282, Plaintiffs' claims must be heard and determined by a District Court of three Judges composed pursuant to the requirements of 28 U.S.C. § 2284.

3. Plaintiff ESPINOSA, age 73, is a permanent resident of the United States who has resided therein continuously since June 20, 1971. Plaintiff ESPINOSA desires to participate in the Medicare Program, but because of his failure to meet the requirement of 42 U.S.C. § 1395o.(2)(A)(ii), he has not attempted to enroll, such attempt being a futile gesture.

4. Plaintiffs DIAZ, age 77, and CLARA, age 67, are aliens lawfully admitted to the United States who have not resided therein continuously for the five (5) years immediately preceeding the month in which they applied for enrollment in the Medicare Program. Both Plaintiff DIAZ and Plaintiff CLARA attempted to enroll in the Medicare Program but on August 4, 1972 received formal letters of rejection from the Social Security Administration for having "not resided in the United States for a required period of time." (See Exhibits "A" (DIAZ) and "B" (CLARA) attached hereto and made a part hereof.)

5. Plaintiffs, ESPINOSA, DIAZ and CLARA, except for their inability to meet the requirements of 42 U.S.C. § 1395o.(2)(A)(ii) aforesaid, fully qualify for enrollment in the Medicare Program and meet all other eligibility prerequisites as required by law. Plaintiffs do not qualify for hospital insurance benefits under 42 U.S.C. § 1395o.(2)(B).

Class Action Allegations

6. This is a class action pursuant to Rule 23(b)(2) F.R.C.P. The class which Plaintiffs represent consists of all persons in the United States who have been or will be denied enrollment under the Medicare Program, 42

U.S.C. § 1395 et. seq. because of their failure to meet the citizenship or residency requirements of 42 U.S.C. § 1395o.(2)(A)(i) and (ii) respectively.

Pursuant to Rule 23(c)(4)(B) F.R.C.P. this class contains one sub-class: All non-citizens in the United States who have attained permanent resident status, who have been or will be denied enrollment under the Medicare Program because of their failure to meet the five (5) year continuous residency requirement of 42 U.S.C. § 1395o.(2)(A)(ii). This sub-class is represented in the within action by Plaintiff ESPINOSA. The class and sub-class are so numerous that joinder of all members is impracticable. Defendant has refused to act on grounds generally applicable to the class and sub-class thereby making appropriate final injunctive and/or corresponding declaratory relief. There are questions of law and fact common to the members of both the class and sub-class. The claims of the Plaintiffs are typical of the claims of the members of their class and sub-class and the Plaintiffs will fairly and adequately protect the interests of the members of the class and sub-class.

7. Sec. 1395o.(2)(A)(i) and (ii) of 42 U.S.C. is unconstitutional in that it denies the equal protection of the laws of the United States to aliens who are otherwise qualified and eligible for Medicare benefits.

8. Plaintiffs have no viable or available administrative remedies; Plaintiffs have no adequate remedy of law.

WHEREFORE, and for the foregoing reasons Plaintiffs respectfully pray as follows:

(a) That this Court assume jurisdiction of this cause pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 405(g), 28 U.S.C. § 1361 and/or 5 U.S.C. § 701.

(b) That this Court will enter an Order determining the class to be all persons denied enrollment in the Health Insurance Program for the Aged (Medicare) solely on account of their alienage and their failure to continuously reside in the United States for five (5) years immediately preceeding the month of their application for enrollment.

(c) That this Court will enter an Order determining

the sub-class represented by Plaintiff ESPINOSA to be all non-citizens lawfully residing in the United States who have attained permanent resident status, but have not continuously resided therein for a period of five (5) years.

(d) That this Court enter a declaratory judgement pursuant to 28 U.S.C. § 2201 declaring that 42 U.S.C. § 1395o.(2)(A)(i) and (ii) is unconstitutional and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

(e) That the Court enter a Preliminary Injunction requiring the Defendant to forthwith approve all applicants for enrollment in the Medicare Program who have been denied eligibility solely for failing to comply with 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(f) That the Court enter a permanent injunction ordering the Defendants to enroll all applicants for Medicare whose applications have been denied solely by reason of their having failed to comply with the requirements of 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(g) That the Court order such appropriate and further relief as to this Court seems just.

Respectfully submitted,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiffs
LEGAL SERVICES OF GREATER MIAMI, INC.
395 Northwest First Street, Suite 202
Miami, Florida 33128
Telephone—379-0822

EXHIBIT "A"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Payment Center
Birmingham, Alabama 35203

Refer To Claim Number
267-29-2044 Santiago Diaz

Bureau of Retirement and Survivors Insurance

August 4, 1972

Santiago Diaz
3690 NW 14 Ter
Miami, FL 33125

This refers to your claim for benefits under the Social Security Act.

You are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A person not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance.

If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the decision made on your claim.

If you have any questions about your claim, you should get in touch with any social security office. Most ques-

tions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. R. Elder
C. R. ELDER
Chief, Claims Authorization Branch

Enclosure:
SSI-58

EXHIBIT "B"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Payment Center
Birmingham, Alabama 35203

Refer To Claim Number
266-31-2607 Jose A. Clara

Bureau of Retirement
and Survivors Insurance

August 4, 1972

Jose A. Clara
1330 W 29 St Apt 14
Miami, FL 33012

This refers to your claim for benefits under the Social Security Act.
You are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A person not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance.

If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the decision made on your claim.

If you have any questions about your claim, you should get in touch with any social security office. Most ques-

tions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. R. Elder
C. R. ELDER
Chief, Claims Authorization Branch

Enclosure:
SSI-58

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 72-1312—Civ-JLK

[Title Omitted]

ORDER GRANTING PLAINTIFF'S MOTION TO ADD PARTIES PLAINTIFF AND PLAINTIFF'S MOTION TO FILE AN AMENDED COMPLAINT

[Filed September 28, 1972]

THIS CAUSE, having come on to be heard upon Plaintiff's Motion to Add Parties Plaintiff and to file an Amended Complaint and the Court being fully informed in the premises, it is upon consideration,

ORDERED AND ADJUDGED, that Plaintiff's Motion to Add Parties Plaintiff CLARA and ESPINOSA be and the same is hereby granted, and it is further

ORDERED AND ADJUDGED that Plaintiff's Motion to File a First Amended Complaint be and the same is hereby granted and Plaintiff's First Amended Complaint shall be deemed filed as of the date hereof.

The Clerk of the within Court shall re-style the cause as indicated by Plaintiff's First Amended Complaint.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida this 28 day of Sept., 1972.

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Court Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-1312—Civ-JLK

[Title Omitted]

MOTION TO DISMISS

[Filed October 24, 1972]

COMES NOW the United States of America, by and through its undersigned United States Attorney, and moves this Court to dismiss the Complaint in the above entitled action on the following grounds:

1. The plaintiffs have failed to allege sufficient grounds to invoke jurisdiction and convening of a Three-Judge Court pursuant to 28 U.S.C. 2282.
2. The plaintiffs have not shown they are entitled to injunctive relief.
3. The Court lacks jurisdiction over the subject matter in that the plaintiffs have failed to exhaust remedies pursuant to Social Security Act as set out in the attached Memorandum of Law and Affidavit.

ROBERT W. RUST
United States Attorney

By: /s/ Raymond B. Ray
RAYMOND B. RAY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed a true copy of the foregoing to Legal Services of Greater Miami, Inc. 395 Northwest First Street, Suite 202, Miami, Florida 33128, this 24 day of October, 1972.

/s/ Raymond B. Ray
RAYMOND B. RAY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTPICT OF FLORIDA

Civil Action No. 72-1312—Civ-JLK

[Title Omitted]

[Filed October 24, 1972]

AFFIDAVIT OF H. DALE COOK

COUNTY OF ARLINGTON)
) ss
STATE OF VIRGINIA)

I, H. DALE COOK, being first duly sworn, depose and say as follows:

(1) I am Chairman of the Appeals Council and Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare. The Bureau of Hearings and Appeals includes, besides the Appeals Council itself, administrative law judges, formerly called "hearing examiners," who hold hearings on claims arising under title II and title XVIII of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination of his claim.

(2) Section 1869(a) of the Social Security Act, 42 U.S.C.A. 1395ff(a), provides that a determination of whether an individual is entitled to benefits under Part A or Part B of title XVIII, shall be made by the Secretary in accordance with regulations prescribed by him.

Section 1869(b), 42 U.S.C.A. 1395ff(b), provides that any individual dissatisfied with any determination as to entitlement under Part A or Part B of title XVIII, shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) of the Act, 42 U.S.C.A. 405(b), and, in the case of a determination as to entitlement, to judicial review of the Secre-

tary's final decision after such hearing as is provided in section 205(g) of the Act, 42 U.S.C.A. 405(g).

(3) One of the functions of the Appeals Council is to pass upon requests for review of hearing decisions rendered by the administrative law judges and to either grant, deny or dismiss any such request. Under the regulations and practice of the Social Security Administration, if the Appeals Council grants a timely request for review of a hearing decision, the Appeals Council then may either make a decision in such case or remand the case to an administrative law judge for a hearing decision. If the Appeals Council makes a decision, the Appeals Council's decision thereupon becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. section 405(g), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *"

(4) A determination with respect to entitlement under Part A under section 226 of the Act (42 U.S.C.A. 426) or section 103 of the Social Security Amendments of 1965 (42 U.S.C.A. 426a) or enrollment under Part B is an initial determination under section 404.905(a) of Regulations No. 4 of the Social Security Administration, 20 CFR 404.905(a). See also sections 405.705(a) and (b) of Regulations No. 5 of the Social Security Administration, 20 CFR 405.705(a) and (b). As such, the provisions of Regulations No. 4 are applicable to these determinations.

(5) Section 404.908 of the aforesaid regulations (20 CFR 404.908) provides that an initial determination shall be final and binding unless it is reconsidered (or unless it is revised in accordance with section 404.956 which is not pertinent herein).

As pertinent here, sections 404.909 to 404.911 of the aforesaid regulations (20 CFR 404.909 to 404.911) provide that any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination. Such reconsideration request must be in writing and filed with the Social Security Administration within six months from the date of mailing notice of the initial determination unless such time is extended as provided in section 404.953 of the aforesaid regulations (20 CFR 404.953).

(6) As pertinent here, section 404.917 of the aforesaid regulations (20 CFR 404.917) provides that an individual has a right to a hearing about any matter designated in section 404.905 (20 CFR 404.905) if an initial determination and a reconsideration of the initial determination have been made by the Administration.

It is provided in the aforesaid regulations at section 404.945 (20 CFR 404.945) that where an administrative law judge has made a decision or dismissed a request for hearing, any party thereto may request the Appeals Council to review such decision or dismissal. Only after the Appeals Council issues a decision or denies review may there be judicial review of a determination under sections 205(g) and 1869 of the Act, *supra*.

(7) In accordance with the provisions of section 404-.902 of Social Security Administration Regulations No. 4 (20 CFR 404.902), as pertinent here, the Social Security Administration Payment Center has jurisdiction for making initial determinations and reconsidered determinations with respect to the entitlement of an individual under titles II and XVIII of the Social Security Act.

(8) I am responsible for the maintenance of Departmental files relating to functions performed by administrative law judges and the Appeals Council on claims arising under title II and title XVIII of the Social Security Act, as amended, including decisions and orders therein and correspondence in reference thereto. The official files maintained by the Bureau of Hearings and Appeals relating to the claims of the plaintiffs, SANTIAGO DIAZ and JOSE A. CLARA, under title II and title XVIII of the Social Security Act, were examined

under my supervision, and to the best of my knowledge and belief said files show that:

(a) On June 15, 1972, the plaintiffs, SANTIAGO DIAZ and JOSE A. CLARA, filed applications for health insurance entitlement under Parts A and B of title XVIII of the Social Security Act and for any cash benefits to which they might be entitled under title II of the Act. The Birmingham, Alabama, Payment Center of the Social Security Administration initially determined that the plaintiffs were not entitled to health insurance protection. Their claims were denied under section 103 of the Social Security Amendments of 1965 *supra* and section 1836 (2)(A)(ii) (42 U.S.C. 1395o(2)(A)(ii)) because they were neither United States citizens nor aliens admitted for permanent residence with five years of continuous residence in the United States. Notices of the initial determinations were sent to the plaintiffs on August 4, 1972.

(b) I have personally directed that a thorough search be conducted of the Departmental files maintained by the Bureau of Hearings and Appeals with respect to the plaintiff, VICTOR CARLOS ESPINOSA. No record was found of this plaintiff having filed any request for hearing or of any decision or order having been rendered by either an administrative law judge or the Appeals Council concerning any title II or title XVIII claim wherein this plaintiff was a party.

(9) Since the only determination on the merits was the initial determination of which notice was given on August 4, 1972, to the plaintiffs, SANTIAGO DIAZ and JOSE A. CLARA, and since there has been no determination on the merits with respect to the plaintiff, VICTOR CARLOS ESPINOSA, none of the plaintiffs have exhausted their administrative remedies.

(10) To the best of my knowledge, information and belief, the plaintiffs' complaint fails to state a cause of action for which relief can be granted under the provisions of sections 1869 and 205(g) of the Social Security Act, as amended, 42 U.S.C.A. sections 1395ff and 405 (g), in that the plaintiffs have not been parties to any

"final decision of the Secretary made after a hearing" with respect to any title II or title XVIII proceeding.

/s/ H. Dale Cook
H. DALE COOK

Subscribed and sworn to before me this 18 day of October, 1972.

/s/ Marvin E. Leas
Notary Public
County of Arlington
State of Virginia
My Commission Expires 7 Sept. 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

MOTION TO DISMISS
[Filed October 25, 1972]

COMES NOW the United States of America, by and through its undersigned United States Attorney, and moves this Court to dismiss the Complaint in the above entitled action on the following grounds:

1. The plaintiffs have failed to allege sufficient grounds to invoke jurisdiction and convening of a Three-Judge Court pursuant to 28 U.S.C. 2282.
2. The plaintiffs have not shown they are entitled to injunctive relief.
3. The Court lacks jurisdiction over the subject matter in that the plaintiffs have failed to exhaust remedies pursuant to Social Security Act as set out in the attached Memorandum of Law and Affidavit.

ROBERT W. RUST
United States Attorney

By:

RAYMOND B. RAY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

AFFIDAVIT OF MANUEL LEVINE
[Filed November 21, 1972]

COUNTY OF BALTIMORE)
) ss
STATE OF MARYLAND)

I, MANUEL LEVINE, being duly sworn, depose and say as follows:

(1) I am an employee of the Bureau of Health Insurance of the Social Security Administration to which the Secretary of Health, Education, and Welfare (hereinafter referred to as the Secretary) has delegated authority (42 U.S.C. 405) for the administration of the programs of health insurance in Title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.).

(2) I have examined the claims folders of the plaintiffs Santiago Diaz and Jose A. Clara and have ascertained the following:

(3) Plaintiff Santiago Diaz filed application on June 15, 1972 for hospital insurance under Part A of Title XVIII of the Social Security Act. He also indicated an intent to enroll in the supplementary medical insurance program of Part B. In his application, he gave as his date of birth, December 30, 1896 and stated that he was born in Cuba.

(4) By checking appropriate checkblocks marked "Yes" or "No", plaintiff Diaz indicated in his application that he is a resident of the United States, but not a citizen of the United States.

(5) Question 12(b) of the application reads as follows: "Are you lawfully admitted for permanent residence in the United States?" With respect to this question, plaintiff Diaz checked the box marked "No". In that part of the application labeled "Remarks", he stated as follows: "I entered U.S.A. on 2/4/71. I have not yet applied for

a change in my status in this country. My wife entered U.S.A. on same date as I did and is not either a permanent resident yet."

(6) The file contains a registration card with the United States Cuban Refugee Center. Plaintiff Diaz gave his birth date as December 30, 1896, and the registration with the Center was on February 4, 1971. The file also contains an application for a social security account number, in which he stated that he was born on December 30, 1896, in Cuba.

(7) At the time plaintiff Diaz filed his application, a district office claims representative explained to Mr. Diaz that he did not meet the requirement of lawful admission for permanent residence with five years of continuous residence in the United States. The plaintiff at this time stated that he had never worked in covered employment.

(8) The social security earnings record of plaintiff Diaz shows no covered earnings at any time, as of June 21, 1972.

(9) Based on the stated birth date of plaintiff Diaz, the Secretary made an initial determination that he would need no quarters of coverage in order to qualify for hospital insurance coverage under the transitional insured status provisions of Section 103 of the Social Security Amendments of 1965, 42 U.S.C. 426a. However, in order to so qualify, and to be eligible to enroll in the supplementary medical insurance program of Part B he must be an alien lawfully admitted for permanent residence and have resided in the United States for a continuous period of five years immediately preceding the date of application.

(10) On August 4, 1972 the claim of plaintiff Diaz was denied initially by the Secretary on the basis that he was not a citizen of the United States and was not an alien lawfully admitted for permanent residence. Moreover, the Secretary determined that he had not resided in the United States for a continuous period of five years. Plaintiff Diaz was notified in writing of this determination and of his right to reconsideration. Plaintiff Diaz has not requested reconsideration of this denial.

(11) Plaintiff Jose A. Clara filed application for hospital insurance on June 15, 1972. He also indicated an intent to enroll in the supplementary medical insurance program of Part B. He stated in his application that he was born on September 22, 1905, in Cuba.

(12) As with plaintiff Diaz (paragraph 4, *supra*), plaintiff Clara indicated that he was a resident of the United States but was not a citizen.

(13) He also checked "No" to question 12(b) asking "Are you lawfully admitted for permanent residence in the United States?" In the space for "Remarks", he stated: "I entered U.S.A. on 7/8/71. I have not yet applied for a change in my status in this country. My wife arrived with me."

(14) The file contains a registration card with the United States Cuban Refugee Center. Plaintiff Clara gave his birth date as September 22, 1905, and the registration with the Center was on July 28, 1971. The file also contains an application for a social security account number, in which he stated that he was born on September 22, 1905, in Cuba.

(15) The social security earnings record of plaintiff Clara shows no covered earnings at any time, as of June 20, 1972.

(16) Based on the stated birth date of plaintiff Clara, the Secretary made an initial determination that he would need 9 quarters of coverage in order to qualify for hospital insurance coverage under the transitional insured status provisions of section 103 of the Social Security Amendments of 1965, 42 U.S.C. 426a. In addition, to so qualify and to be eligible to enroll in the supplementary medical insurance program of Part B, he must be an alien lawfully admitted for permanent residence and have resided in the United States for a continuous period of five years immediately preceding the date of application.

(17) On August 4, 1972, the claim of plaintiff Clara was denied initially by the Secretary on the basis that he was not a citizen of the United States and was not an alien lawfully admitted for permanent residence. Moreover, the Secretary determined that he had not resided in the United States for a continuous period of five years.

The Secretary also made an initial determination that he lacked the requisite number of quarters of coverage for entitlement under section 103, *supra*. Plaintiff Clara was notified in writing of this determination and of his right to reconsideration. Plaintiff Clara has not requested reconsideration of this denial.

(18) I have no information with respect to the claim of plaintiff Victor Carlos Espinosa.

/s/ Manuel Levine
MANUEL LEVINE
Bureau of Health Insurance
Social Security Administration
Department of Health, Education, and Welfare

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER DENYING MOTION TO DISMISS
[Filed November 22, 1972]

This action came on before a three-judge court consisting of David W. Dyer, United States Circuit Judge, Joe Eaton, United States District Judge and James Lawrence King, United States District Judge, in argument on defendant's motion to dismiss. The court, having considered the pleadings, argument and stipulation of the parties in open court, finds and concludes that this court properly has jurisdiction. Moreover, the parties have stipulated that no factual issues are in dispute and that this case may be decided on cross motion for summary judgment without further oral argument. Therefore it is,

ORDERED and ADJUDGED that:

1. Defendant's motion to dismiss be and the same is hereby denied.
2. Plaintiffs shall submit their brief on the merits within fourteen (14) days of the date of this order.
3. Defendant shall submit his response within fourteen (14) days of service of plaintiffs' brief.
4. Plaintiffs shall have five (5) days from service of defendant's response within which to answer, if they so choose.

DONE and ORDERED in chambers at Miami, Florida, this 22nd day of November, 1972.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

cc: Alfred Feinberg, Esq.
United States Attorney

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

MOTION FOR SUMMARY JUDGMENT
[Filed December 11, 1972]

Plaintiffs, by and through their undersigned counsel respectfully move this Honorable Court for a Summary Judgement and in support thereof state that there are no issues of disputed fact which remain to be decided by the Court.

Respectfully submitted,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiffs
LEGAL SERVICES OF GREATER MIAMI, INC.
395 Northwest First Street, Suite 202
Miami, Florida 33128
Telephone—379-0822

EXHIBIT "A"
MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

CUBAN REFUGEE CENTER - WEEKLY STATISTICAL REPORT

PERIOD November 13-17, 1972

PART A: TOTAL PROGRAM REPORT

I - REGISTRATIONS					II - RESETTLEMENTS							
	THIS WEEK		CUMULATIVE *		THIS WEEK				CUMULATIVE *			
	Cases	Persons	Cases	Persons	Single Cases	Family Cases	Total Cases	Total Persons	Single Cases	Family Cases	Total Cases	Total Persons
USCC	12	15	144,765	298,485	5	2	7	9	42,356	47,302	89,649	183,451
IRC	9	11	44,720	92,180	2	1	3	4	14,806	15,215	30,011	61,836
CWS	1	3	24,706	51,431	-	-	-	-	7,929	10,991	18,920	43,204
ETAS	-	-	2,321	4,481	-	-	-	-	429	854	1,283	2,838
TOTAL	22	29	216,512	446,387	7	3	10	13	65,520	74,362	139,883	291,329

PART B - AIRLIFT PERIOD - 1 DEC. - 1965 TO PRESENT

I - ARRIVALS					II - RESETTLEMENTS			
	THIS WEEK		AIRLIFT - PERIOD CUMULATIVE		THIS WEEK		AIRLIFT PERIOD CUMULATIVE	
	Cases	Persons	Cases	Persons	Cases	Persons	Cases	Persons
AIRLIFT	-	-	109,777	256,351	8	11	78,489	182,935
NON-AIRLIFT	22	28	14,925	23,397	2	2	9,540	18,486
CONSOLIDATED TOTAL	22	28	124,702	279,748	10	13	88,029	201,421

% of total Resettlements to total Arrivals since 1 Dec/65	72.0 %
% Of total Resettlements to total Registration since Jan/61	66.3 %
No. of last Airlift flight arriving Friday - was -	

CREC 182 (3-20-70) * Since January 1961

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CUBAN REFUGEE PROGRAM

CONSOLIDATED REPORT OF OVERALL OPERATIONS

Month of January 1963(*)

	Arrivals and Registrations		Resettlements	
	Monthly	Cum. since 12/1/65	Monthly	Cum. since 12/1/65
AIRLIFT:				
Arrivals	3,062	96,700		
Registrations	3,015	83,531	2,678	68,439
OTHER:				
Registrations	321	7,326	273	11,478 (**)
TOTAL	3,336	90,857	2,951	79,917

(All figures cumulative since Dec. 1, 1965)

Total Airlift arrivals	96,700
Total Other registrations	7,326
Total cumulative Airlift arrivals and Other registrations ...	104,036
Total resettlement (Airlift and Other)	79,917
Percentage of total resettlements to total registrations and arrivals	77%

Remarks: (*) Covers from 12/30/62 through 2/2/63 or 5 weeks period.

(**) This total includes other arrivals and numerous refugees who resided in the Miami area before the Airlift began.

RCS/SU

EXHIBIT "B"

41

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MONTH OF January 1968 (*)

AIRLIFT ARRIVALS — CUMULATIVE (Since Dec.1, 1965 to 2/2/68)

		%
Men	25,741	27
Women	38,378	40
Children	31,589	33
Total arrivals as of 2/2/68	96,708	100

Age categories and Occupations:

AGES	Month of January	12/1/65 - 2-2-68 Cumulative	% (Cum.)
0- 5	425	12,119	12.5
6-18	830	20,221	20.9
19-29	382	9,650	10.0
30-39	635	18,342	19.0
40-49	510	15,393	15.9
50-60	451	10,663	11.0
61-65	185	3,991	4.1
over 65	292	6,389	6.6
TOTALS	3862	96,708	100.0
OCCUPATIONS:			
Professional, Semi-Pro. & Managerial	215	6,688	6.9
Clerical & Sales	485	11,535	11.9
Skilled	382	8,253	8.6
Semi-Skilled & Un-skilled	96	3,335	3.5
Services	123	3,104	3.2
Agricultural & fishery	66	1,562	1.6
Students, Children & Housewives	2,490	62,173	64.3
TOTALS	3,862	96,708	100.0

Remarks: (*) The month of JANUARY covers 5 weeks period. (12/30/67 2/2/68)

RCS/SU

EXHIBIT "B"

42

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CUBAN REFUGEE PROGRAM

CONSOLIDATED REPORT OF OVERALL OPERATION

Month of October 1972 (*)

	Arrivals and Registrations		Resettlements	
	Monthly	Cum. since 12/1/65	Monthly	Cum. since 12/1/65
AIRLIFT Arrivals	-	256,351	70	182,904
Registrations	68	239,488		
OTHER Registrations	212	23,337	8	18,482 (**)
TOTAL	280	262,825	78	201,386

(All figures cumulative since Dec. 1, 1965)

Total Airlift arrivals	256,351
Total Other registrations	23,337
Total cumulative Airlift arrivals and other registrations	279,688
Total resettlement (Airlift and Other)	201,386
Percentage of total resettlements to total registrations and arrivals	72.0%

Remarks: (*) Covers from September 30, 1972 through October 31, 1972 or 5 weeks period.

(**) This total includes other arrivals and numerous refugees who resided in the Miami area before the Airlift began.

AM/CU
CR33-325 (4-4-68)

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EXHIBIT "C"

MONTH OF October (*)

AIRLIFT ARRIVALS — CUMULATIVE (Since Dec.1, 1965 to October 31, 1972

Men	71,343	27.8 %
Women	97,864	38.2
Children	87,144	34.0
Total arrivals as of October 31, 1972	256,351	100.0 %

AGE CATEGORIES AND OCCUPATIONS:

AGE	Month of October	12/1/65 - 10/31/72 Cumulative	% (Cum.)
0 - 5	-	25,903	10.1 %
6 - 18	-	62,089	24.2
19 - 29	-	22,024	8.6
30 - 39	-	49,823	19.5
40 - 49	-	40,195	15.7
50 - 60	-	26,658	10.4
61 - 65	-	10,540	4.1
over 65	-	19,099	7.4
TOTAL	-	256,351	100.%
OCCUPATIONS:			
Professional, Semi-Pro. & Managerial	-	15,285	6.0%
Clerical & Sales	-	28,831	11.2
Skilled	-	23,151	9.0
Semi-Skilled & Un-skilled	-	10,792	4.2
Services	-	8,068	3.2
Agricultural & fishery	-	5,256	2.1
Students, Children & Housewives	-	164,968	64.3
TOTAL	-	256,351	100.%

Remarks: (*) The month of October covers weeks period.

(9/30/72 - 10/31/72)

RCS/SU
CREC 125 A (4-4-68)

EXHIBIT "C$_3$"

44

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

MEMORANDUM OPINION

[Filed June 11, 1973]

Before DYER, Circuit Judge, EATON and KING, District Judges.

JAMES LAWRENCE KING, District Judge: This action challenges the constitutionality of the eligibility requirement for aliens who wish to enroll in the supplemental medical insurance plan established as part of the Medicare program. Section 1836(2)(A)(ii) of the Social Security Act of 1935, *as amended*, 42 U.S.C. § 1395o (2)(A)(ii) (1970), disqualifies all aliens from benefits but those lawfully admitted for permanent residence who have resided in the United States continuously for five years prior to making application for enrollment.[1]

The supplemental medical insurance program, 42 U.S.C. § 1395j *et seq.* (1970), pays a substantial part of the cost of physicians' services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. §§ 1395k, 1395x (m) and (s) (1970). Unlike Medicare's companion hospital insurance plan, 42 U.S.C. § 1395c *et seq.* (1970),

---

[1] Section 1836 provides:

"Every individual who—

(1) has attained the age of 65, and

(2)(A) is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, or (B) is entitled to hospital insurance benefits under Part A,

is elegible to enroll in the insurance program established by this part."

42 U.S.C. § 1395o (1970).

one-half of the cost of the supplemental insurance program is financed by monthly premiums paid by individuals aged 65 or older who choose to enroll. 42 U.S.C. § 1395r(b) (1970).

Plaintiffs, who are Cuban refugees, seek injunctive and declaratory relief against operation of the alien eligibility provision on behalf of themselves, a class and sub-class of aliens similarly situated, pursuant to Fed. R. Civ. P. 23(a), (b)(2) and (c)(4). They charge that because the eligibility provision applies to aliens, but not to citizens, it discriminates invidiously against them in violation of the due process clause of the fifth amendment. A three-judge court was convened to consider their claim in accordance with 28 U.S.C. §§ 2282, 2284 (1970). The parties have stipulated, and we find, that no factual issues remain in dispute and that this action is ripe for decision on their opposing motions for summary judgment.

JURISDICTION

The court possesses jurisdiction pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) (1970),[2] and we therefore need not consider the other

[2] Judicial review of supplemental medical insurance entitlement determinations is governed by Section 1869 of the Social Security Act of 1935, *as amended*, which provides in pertinent part:

> "Any individual dissatisfied with any determination . . . as to entitlement under . . . part B [the supplemental medical insurance plan] . . . shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) of this title, and, in the case of a determination as to entitlement . . . to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g) of this title."

42 U.S.C. § 1395ff(b) (1970). Section 205(g) of the Act in turn provides in pertinent part:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

42 U.S.C. § 405(g) (1970).

jurisdictional allegations of the complaint.[3] Although § 205(g) by its terms mandates a "final decision" by the Secretary prior to judicial review, to require plaintiffs to exhaust their administrative appeals would be to demand a futile act.

The purpose of § 205(g) is to "delay judicial review until (1) findings of fact are made by the Secretary or (2) the Secretary has had an opportunity to correct a lower level administrative error." *Morris* v. *Richardson*, 346 F.Supp. 494, 495 (N.D.Ga. 1972) (three-judge court, *appeal dismissed sub nom. Morris* v. *Weinberger*, —— U.S. —— (1973). Neither problem is presented here. No factual issues remain in dispute, and 42 U.S.C. § 1395o(2)(A)(ii) (1970) places the Secretary under a ministerial duty to deny plaintiffs' applications for enrollment for supplemental benefits. Under these circumstances, we think it unnecessary for the named plaintiffs, who have applied for benefits, to pursue formalistic administrative appeals of initial adverse determinations.

Likewise, the general exhaustion doctrine is inapplicable to this case because plaintiffs challenge the statute's constitutionality. It is settled that "[w]here a plaintiff attacks the constitutionality of the statute under which an administrative agency acts, and the attack does not turn upon a factual determination requiring administrative expertise, the doctrine of exhaustion of administrative remedies does not apply." *Gainville* v. *Richardson*, 319 F.Supp. 16, 18 (D. Mass. 1970) (three-judge court), *citing Public Util. Comm'n* v. *United States*, 355 U.S. 534, 539 (1958); *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 242 (1968); *cf. King* v. *Smith*, 392 U.S. 312 n.4 (1968).

[3] Plaintiffs also alleged jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702 (1970).

CLASS ACTION DEMAND

Plaintiffs have moved for certification of this case as a class action with one sub-class pursuant to Fed. R. Civ. P. 23(a), (b)(2) and (c)(4).[4] The parties have stipulated that plaintiffs Diaz and Clara are Cuban refugee immigrants who have been admitted for residence in the United States,[5] but who have neither resided in

[4] Plaintiffs' motion requested representation of a class consisting of:

> "All persons in the United States who have been or will be denied enrollment under the Medicare Program, 42 U.S.C. § 1395 *et seq.* because of their failure to meet the citizenship or residency requirements of 42 U.S.C. § 1395o(2)(A)(i) and (ii)."

They also sought to represent a sub-class of:

> "All non-citizens in the United States who have attained permanent resident status, who have been or will be denied enrollment under the Medicare Program because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. § 1395o(2)(A)(ii)."

These proposed definitions are overbroad. Plaintiffs do not challenge their denial of enrollment in the entire "Medicare Program," which contains a similar alien eligibility provision for its hospital insurance plan, 42 U.S.C. § 426a(a)(4) (1970), but only the eligibility requirement for the supplemental medical insurance plan. In addition, the class plaintiffs Diaz and Clara propose to represent would include all aliens from ambassadors to vessel crew members. Such a definition finds no support in the stipulated facts, nor do we think it can comport with the requirement of Fed. R. Civ. P. 23(a)(3) that the claims or defenses of the representative parties be typical of those of the class. We will therefore make appropriate emendations to narrow the definitions of the class and sub-class certified.

[5] Plaintiffs Diaz and Clara, like many other Cuban refugees, were "paroled" into the United States by the Attorney General, and remain here at his discretion. 8 U.S.C. § 1182(d)(5) (1970). As parolees, they were allowed to reside in this country without regard to openings in the numerical limitations for immigrants. 8 U.S.C. §§ 1151, 1101(a)(27); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911. Although parole of an alien "shall not be regarded as an admission," 8 U.S.C. § 1182(d)(5) (1970), and does not ordinarily place him "legally within the United States," *Ma* v. *Barber*, 357 U.S. 185, 189-90 (1958), we think that the

the United States continuously for five years nor been lawfully admitted for permanent residence within the statutory meaning of that term.[6] Plaintiff Espinosa has

special legislation which authorizes the adjustment of status of Cuban parolees to that of lawful admission for permanent residence implicitly recognizes that their parole contemplates something more in the nature of an entry than a detention. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970). *See* note 6 *infra*.

In addition to parole, there is one other significant way for immigrant aliens to avoid the numerical limitations and to gain admission to the United States. A limited number of "conditional entry" permits is available to aliens uprooted from their homeland by designated natural catastrophes and by persecution either in Communist-dominated nations or in countries in the Middle East. 8 U.S.C. § 1153(a)(7) (1970).

[6] The Secretary defers to factual determinations by the Attorney General that an alien seeking enrollment in Medicare comes within the statutory meaning of this phrase, pursuant to Social Security Ruling 68-38 which states, in pertinent part:

> "The phrase 'lawfully admitted for permanent residence', as found in section 103(a)(4) of P. L. 89-97 and section 1836(2)(a) of Title XVIII, is a term of art adopted from the Immigration and Nationality Act, in section 101(a)(29) of which it is defined [8 U.S.C. § 1101(a)(20) (1970)]. Accordingly, the phrase has the same meaning in Title XVIII as it does in the Immigration and Nationality Act. The Administration, in its determinations under sections 103 and 1836 is obliged to accept the determinations of the Attorney General and his delegates as to the fact of lawful admission, since only that official is authorized by statute to make such determinations."

Social Security Administration, 1968 Cum. Bull. 197, *in* 1 Unempl. Ins. Rep. ¶ 15,064 at 2499-289; *cf.* Social Security Administration, Claims Manual, pt. 10, §§ 10108.7-10108.9 (1973).

Under the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C. §§ 1101 *et seq.* (1970), every applicant for admission to the United States is presumed to be an immigrant seeking lawful admission for permanent residence until he demonstrates that he is entitled to admission as a nonimmigrant. 8 U.S.C. § 1184 (1970); *see* note 8 *infra*. An immigrant who meets the other requirements for admission must await an opening in the numerical limitations before he may be issued an immigrant visa and, upon arrival, acquire permanent residence status. 8 U.S.C. § 1151(a) (1970).

Aliens who arrive in the United States not as immigrants, but as parolees, conditional entrants or nonimmigrants may, in

been lawfully admitted for permanent residence, but has not yet resided in the United States continuously for five years. All have applied for enrollment in the supplemental medical insurance program and been rejected.[7]

Plaintiffs submit, and we find, that each of the prerequisites for maintenance of a class action pursuant to Rules 23(a) and (b)(2) has been met with respect to both the class and sub-class hereinafter defined. The class certified in this action shall consist of:

> All immigrants[8] residing in the United States who have attained the age of 65 and who have been or

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some cases, later obtain adjustment of their status to that of permanent residence. Thus, Cuban parolees like plaintiffs Diaz and Clara become eligible for an adjustment of status after being "physically present in the United States for at least two years." Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970). Upon making application, the Cuban parolee faces a further delay, which we are informed is now approximately two years, while he awaits an opening in the Western Hemisphere numerical limitation. *Id; see* note 5 *supra*. After acquiring a place in the quota and a determination of admissibility from the Attorney General, he is entitled to permanent residence status retroactive, in most cases, to the date of his admission. *Id.* It is important to note, however, that in practice Cuban parolees cannot ordinarily obtain permanent residence status until they have resided in the United States for four years or more.

Likewise, conditional entrants may obtain permanent residence status retroactive to the date of their entry after residing in the United States for at least two years. 8 U.S.C. § 1153(g) and (h) (1970). With the exception of alien crewmen and natives of countries of the Western Hemisphere, other aliens may obtain adjustments of their status at the discretion of the Attorney General no matter how they first lawfully gained admission into the United States, provided that there is an opening in the numerical limitations. 8 U.S.C. § 1255 (1970). Adjustments may also be made by the Attorney General to avoid hardships in the case of deportable aliens, 8 U.S.C. § 1254 (1970), and aliens who arrived in the United States prior to July 1, 1924. 8 U.S.C. § 1259 (1970).

[7] Plaintiff Espinoza's claim denial notice does not appear of record, but 42 U.S.C. § 1395o(2)(a)(ii) (1970) imposes upon the Secretary a ministerial duty to reject his application, and we proceed upon the assumption that the Secretary did not act improperly.

[8] The word "immigrant" is a term of art employed by the Immigration and Nationality Act of 1952, which is defined as "*every* alien except an alien who is within one of the . . . classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) (1970) (emphasis added). Twelve categories of nonimmigrant aliens are explicitly enumerated by the Act and inculde, for example, diplomatic personnel, short-term visitors for business or pleasure, crewmen, students, braceros and foreign correspondents. *Id.* We use the term in its technical sense, which encompasses conditional entrants, as well as to include those who, like Cuban parolees, may become immigrants through retroactive adjustments of status. *See* note 5 *supra*.

> will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), because they are not aliens lawfully admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by 42 U.S.C. § 1395o(2)(A)(ii) (1970).

Pursuant to Rule 23(c)(4), we will also certify a subclass consisting of:

> All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. § 1395o(2)(A)(ii) (1970).

Equal Protection Standard

Whether the compelling governmental interest test or the rational basis criterion provides the applicable standard by which the constitutionality of the alien eligibility provision must be assessed presents the threshold question for consideration. Defendant contends that because this case falls within the area of economic and social welfare legislation, it must ipso facto be governed by the rule that the "Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960);

Dandridge v. *Williams*, 397 U.S. 471 (1970); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *United States* v. *Kras*, —— U.S. —— (1973). But the government's reliance on *Nestor* and its progeny is inapposite to the extent that none of those cases involved even a colorable claim of discrimination.

Plaintiffs respond that the deprivation they suffer from denial of eligibility for supplemental medical insurance can only be justified if "necessary to promote a compelling governmental interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), because the classification they challenge, as one based on alienage, is "inherently suspect," *Graham* v. *Richardson*, 408 U.S. 365, 376 (1971); *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *cf. Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Loving* v. *Virginia*, 388 U.S. 1 (1967), and burdens their access to one of the "necessities of life" in which they assert a "fundamental right." *Roe* v. *Wade*, —— U.S. —— (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Shapiro* v. *Thompson*, *supra*; *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

But plaintiffs' invocation of cases requiring a compelling interest to justify classifications burdening or infringing certain fundamental constitutional rights is not entirely persuasive. Although we cannot denigrate the importance of medical care to the aged, or the possibility that its deprivation may amount to the denial of the constitutional right to life itself, it is far from clear that the denial of such "necessities of life" alone justifies application of the compelling interest standard. *Compare Graham* v. *Richardson*, *supra* at 380 *with Lindsey* v. *Normet*, *supra* at 73-74. Moreover, the very infancy of this, the first Congressional enactment ever to provide medical care benefits, cautions against presuming it to be a "fundamental right," the denial of which necessitates a high level of legislative justification. *Cf. Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). On the contrary, in

the absence of an apparent or presumptive discriminatory purpose or effect, the courts have refrained from applying the compelling interest standard to social benefit legislation. *E.g. Lindsey* v. *Normet*, *supra*; *Jefferson* v. *Hackney*, *supra*; *Richardson* v. *Belcher*, *supra*; *Dandridge* v. *Williams*, *supra*.

Likewise, plaintiffs' reliance on decisions imposing a compelling interest standard on classifications deemed "inherently suspect" proves too much. Such a per se rule is doubtless appropriate where classifications are "based on unalterable traits such as race and lineage." *Lindsey* v. *Normet*, *supra* at 73 (footnotes omitted). But the fact that alienage is a governmentally created status suggests that it may not constitute such a consistently illegitimate distinction as to warrant mechanical application of the compelling interest test.[9] Indeed, the leading case treating alienage as an "inherently suspect" distinction avoided the express use of that test, *Graham* v. *Richardson*, *supra* at 375-76, although some more recent alienage decisions have held Congress to the compelling interest standard. *E.g. Jalil* v. *Hampton*, 460 F.2d 923 (D.C.Cir. 1972); *Faruki* v. *Rogers*, 349 F.Supp. 723 (D.D.C. 1972).

Although we cannot say that Congress may never be held to a lesser constitutional standard than the states, *but see Morris* v. *Richardson*, *supra* at 499, neither can we accept the view that Congress may never be held to the same standard. For example, to differentiate between citizens and aliens in regulating entry into the United States may be a presumptively proper exercise of Congressional power, whereas a like discrimination by legislatures regulating entry into the states would not: different fourteenth and fifth amendment constitutional tests might therefore be appropriate. *Cf. Graham* v. *Richardson*, *supra*; *Shapiro* v. *Thompson*, *supra*.

Inversely, there are occasions when the compelling interest test might just as appropriately be applied to Congressional enactments as to those of state legislatures.

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[9] *See* Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 Duke L.J. 583, 594-97 (1971).

For example, the fact must not be overlooked that aliens are not simply politically disadvantaged, as are members of other "inherently suspect" classifications: they lack the power of the ballot entirely at both the state and federal levels. Moreover, aliens have endured a long history of open discrimination at the hands of the political process. *See, e.g. Oyama* v. *California*, 332 U.S. 633, 651 n.1 (1948) (Murphy, J. concurring). Because the political system provides no check on such discrimination, there may well be instances when application of a compelling interest standard is warranted in review of state and federal enactments to protect aliens from discrimination resulting from their lack of political representation.

If it is a close question whether the compelling interest standard should be applied to a classification based on alienage under the circumstances here, we think similar considerations permit the conclusion that, whatever the standard, the protection of fifth amendment due process is available to remedy such claims of discrimination against aliens as appear in this case. It is settled, at least, that aliens lawfully residing in the United States are "persons" within the meaning of both the fourteenth and fifth amendments, and are entitled to their protection. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586 n.9 (1952); *Truax* v. *Raich*, 239 U.S. 33 (1915).

Moreover, even though fourteenth amendment notions of equal protection are not entirely congruent with fifth amendment concepts of due process, it is nonetheless accepted that "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The danger of unjustifiable discrimination against aliens is nowhere greater than in the enactment of social benefit programs like Medicare, where their complete lack of representation in the political process may result in the purposeful or inadvertent exclusion of aliens from benefits. It is in this sense that "[a]liens as a class are a prime example of a discrete and insular minority." *Graham* v. *Richardson*, *supra* at 372. We therefore conclude that the fifth amendment can here be said to contain the same "pledge of the protection of equal laws," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886), as is evident from the fourteenth amendment. *Cf. Richardson* v. *Belcher*, *supra* at 81.

A statutory classification accords with fundamental equal protection and due process notions only if, as recent decisions employing the rational basis test have acknowledged, it is both "rationally based *and free from invidious discrimination.*" *Dandridge* v. *Williams*, *supra* at 487, *quoted in Richardson* v. *Belcher*, *supra* at 81 (emphasis added); *cf. Jefferson* v. *Hackney*, *supra* at 547. Invidious discrimination may appear in either an impermissible statutory purpose, *see Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo* v. *Hopkins*, *supra*, or in the choice of a classification that is impermissibly discriminatory as applied to achieve a valid legislative purpose. *Cf. Hirabayashi* v. *United States*, 320 U.S. 81 (1949); *Korematsu* v. *United States*, *supra*. Because alienage is a classification "inherently suspect and . . . therefore subject to strict judicial scrutiny," *Graham* v. *Richardson*, *supra* at 376, we think the rational basis standard requires no less than such a twofold analysis of the provisions challenged here.[10] Whether the compelling interest standard should be applied instead need not be decided in view of our holding, for the reasons which follow, that the alien eligibility provision cannot meet even the requirements of the rational basis test.

ARGUMENT

Plaintiff contends that the entirety of the alien eligibility provision for supplemental medical benefits violates due process. For the sake of convenience, we turn our attention first to the five-year continuous residency aspect of 42 U.S.C. § 13959(2)(A)(ii) (1970). Defendant has advanced two legislative purposes which he asserts are valid of themselves and bear a rational relationship to this durational residency condition: (1) that the residency requirement is essential to the continuing fiscal

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[10] *See Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1077-87 (1969).

integrity of the supplemental benefits program; and (2) that it is necessary to prevent certain aliens, such as short-term visitors, from obtaining benefits.

A. *Fiscal Integrity*

We do not doubt that a desire to insure the continued fiscal integrity of the supplemental benefits program is itself a valid governmental purpose. *Cf. Shapiro* v. *Thompson, supra* at 633. But the facts do not support defendant's conclusion that the residency requirement either was intended to serve, or does serve, that objective.

If, in fact, Congress intended to protect the fiscal integrity of the program by attaching a residency requirement for alien eligibility, the legislative history of the provision is singularly casual about such a concern. The House-passed bill contained no durational residency requirement at all for alien participation in the supplemental benefits program. H. Rep. No. 682, 89th Cong., 1st Sess. 39 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233-34 (1965). Although the Senate version added a 10-year residency provision, 111 Cong. Rec. 15609, 15613 (1965), a conference committee compromise reduced it to the present five-year term. H. Rep. No. 682, *supra* at 39-40. It is therefore difficult to conclude that Congress considered the durational residency requirement for aliens an element particularly important to the fiscal integrity of the supplemental medical insurance program.

The government nonetheless argues that the alien residency requirement is necessary to permit the supplemental benefits program to become increasingly self-supporting. Whereas this purpose may be apparent in the hospital insurance program created by Medicare, 42 U.S.C. § 426a (1970); S. Rep. No. 404, 89th Cong., 1st Sess. 66-70 (1965), *in* U.S. Code Cong. & Ad. News 2007-11 (1965), it is not true of Medicare's supplemental medical insurance program.

The Federal Supplementary Medical Insurance Trust Fund created by the 1965 Medicare Amendments derives one-half of its income at all times from appropriations of the general revenues of the United States. 42

U.S.C. § 1395w (1970). The remaining half is supplied by monthly premium payments from eligible individuals who choose to enroll in the program. 42 U.S.C. § 1395r(b)(2) (1970). Moreover, unlike the hospital insurance system, the supplemental benefits program was intended by Congress to run on a "current cost" financing basis, and to be equally funded by general revenue contributions and adjustable premiums. S. Rep. No. 404, *supra*. Thus, the only discernible means by which the trust fund might become increasingly self-supporting is through adequate appreciation of its investments to permit decreases not only in premium payments but also in general revenue contributions. We can therefore find no evidence that the alien residency requirement is either necessary or rationally related to the asserted purpose of maintaining, much less improving, the fiscal position of the supplemental medical insurance program.

Nor can defendant argue that Congress may validly exclude retirement-age aliens from participation in the supplemental benefits program simply because their inclusion would require additional federal revenue contributions to the trust fund. Regardless of whether they have ever in their lives paid federal taxes, retired indigent citizens who receive state public assistance benefits are eligible for the supplemental medical insurance program, *see* 42 U.S.C. § 1395s(f) and (i) (1970), and the general revenues provide half the cost of their benefits. Moreover, federal tax revenues are still further depleted on behalf of retired indigent citizens to the extent that the supplemental program's monthly premiums due from them may be paid by state public assistance programs, 42 U.S.C. § 1305v(d)(1) (1970), which are funded in substantial part by the federal government. 42 U.S.C. § 1396b(a)(1) (1970). But the five-year residency requirement operates to exclude retirement-age aliens, whether indigent or not, from these same benefits, despite the fact that those among them who are indigent may not be barred from state public assistance programs on the basis of durational state residency requirements. *Machado* v. *Department of Health & Rehab. Serv.*, —— F.Supp. —— (S.D.Fla. 1973) (three-judge court); *Zarate*

v. *Department of Health & Rehab. Serv.*, 347 F.Supp. 1004 (S.D. Fla. 1971) (three-judge court); *cf. Graham* v. *Richardson*, *supra*; 42 U.S.C. § 1396a(a)(10)(II) (1970).

If it was the Congressional purpose to preserve the general federal revenues from depletion by excluding aliens alone through the residency requirement, that classification results in a discrimination which can only be termed invidious. The general revenues used to pay supplemental benefits to retired indigent citizens come from taxes imposed on all non-indigents in the United States, and it must not be forgotten that "[a]liens, like citizens pay taxes." *Graham* v. *Richardson*, *supra* at 376. Federal taxes paid by aliens therefore underwrite the very supplemental benefits for retired indigent citizens which Congress has made unavailable to members of plaintiffs' class. To the extent that aliens, but not citizens, are deprived of supplemental benefits by the durational residency requirement, the classification discriminates invidiously against them.[11] If Congress may choose to underwrite a major part of the medical expenses of retired indigent citizens with funds from the public treasury, it may not constitutionally do so on the basis of a classification which works an exclusion from benefits of similarly situated aliens. *Shapiro* v. *Thompson*, *supra* at 633 & n.11.

In addition, we must question the basic rationality of attempting to achieve cost economies in the supplemental

[11] As of November 1972, Cuban Refugee Center statistics showed that 446,387 Cuban refugees had arrived in the United States since January 1961. Cuban Refugee Program, Weekly Statistical Report, pt. A (Nov. 17, 1972), Plaintiffs' Memorandum for Summary Judgment, Exhibit A. Of these, 159,643 arrived between February 2, 1968, and October 30, 1972, during which period 12,730 or 8 percent were age 65 or over upon arrival. *Compare* Cuban Refugee Program, Consolidated Report of Overall Operation (Oct. 1972), Plaintiffs' Memorandum for Summary Judgment, Exhibit C2, *with* Cuban Refugee Program, Consolidated Report of Overall Operation (Jan. 1968), Plaintiffs' Memorandum for Summary Judgment, Exhibit B2. Although this sample is inadequate as a basis for more detailed projections, it does not appear that the number of Cuban refugees whose age would otherwise qualify them for supplemental medical insurance benefits is disproportionately large in comparison with the number of potential new taxpayers.

medical benefits program by means of a residency requirement having the necessary effect that this one now has on members of plaintiffs' class. Because it simply serves to postpone their eligibility for supplemental medical benefits, we think it not improbable that those who desire and need such benefits will defer, insofar as humanly possible, all covered medical expenses until such time as they meet the eligibility requirements. The net result can only be higher benefits claims for each such individual when he becomes eligible, given a five-year period of minimal medical care with its attendant frustration of the economies of preventive medicine. Thus, the residency requirement appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases.

B. *Undeserving Aliens*

The government suggests, secondly, that Congress may validly seek to exclude entirely certain aliens from receiving supplemental medical insurance benefits. Specifically, defendant asserts that Congress may rationally bar from the program aliens visiting or residing in the United States temporarily, aliens who enter solely to obtain medical treatment, and aliens who are residing illegally in the United States. We assume, without deciding, that such a purpose is a proper one. *But see Shapiro* v. *Thompson*, *supra* at 631.

We think the alien residency requirement constitutes an overly inclusive classification to accomplish any of these purposes. Although a five-year period may be long enough effectively to exclude most short-term alien visitors or residents, it will not exclude those maintaining their domicile abroad but who, like ambassadors, foreign correspondents and other professionals, may be required by their occupation to reside in the United States for longer periods of time. Even aliens entering the country for medical treatment will not necessarily be excluded by the alien residency requirement if the treatment they seek

demands such prolonged care and observation as may be necessary for cancer and other major diseases. Likewise, if the five-year residency test contributes at all to the apprehension and exclusion from benefits of aliens residing here illegally, a shorter residency period should perform the same functions even better. The durational residency provision "enact[s] what in effect are non-rebuttable presumptions that every [alien] applicant for assistance" came to the United States for a disqualifying purpose. *Shapiro* v. *Thompson*, *supra* at 631. To utilize the alien residency requirement to serve these purposes is therefore to use a particularly blunt instrument for a surgical task.

In evaluating the impact of this implement on plaintiffs' class, we cannot ignore the fact that its design was, as we have noted, the product of compromise. Perhaps the only consistent result of that compromise is to exclude immigrant aliens from supplemental medical benefits until such time as they are eligible for citizenship and, as citizens, for benefits.[12] The fact that the compromise residency requirement corresponds to the waiting term for naturalization cuts against, not in favor of its constitutionality as a tool for barring a limited number of aliens from benefits. If some aliens may legitimately be excluded from the supplemental medical benefits program, as we have assumed, the use of a classification so overbroad that it excludes almost all aliens *qua* aliens is invidiously discriminatory, if it is not arbitrary and without rational basis. *Cf Hirabayashi* vs. *United States*, *supra*; *Korematsu* v. *United States*, *supra*.

[12] Five years of continuous residence are also required for eligibility for naturalization. 8 U.S.C. § 1427(a)(1) (1970); *see* note 21 *infra*. Naturalized citizens are, of course, eligible for supplemental medical insurance benefits upon the sole condition that they attain the age of 65. 42 U.S.C. § 1395o(1) and (2)(A)(i) (1970). Although naturalization requires permanent residence status in conjunction with five years of residence, adjustments of status retroactive to the date of arrival can be obtained by plaintiffs and members of the class they represent, a process which takes less than five years in the case of Cuban parolees. *See* note 6 *supra*.

C. *Other Justifications*

Shapiro v. *Thompson* suggests other possible legislative purposes which might justify the alien residency requirement, although defendant has not urged them upon us. They merit consideration because the courts, in applying the rational basis standard, have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification.[13] It could be argued here, as it was in *Shapiro*, that the residency requirement "(1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages the early entry of new residents into the labor force." 394 U.S. at 643.

The fact that no residency requirement for eligibility is placed on citizens belies any attempt to justify it as essential for planning either general revenue or trust fund budgets, especially since long-term projections are unnecessary given the program's funding on a "current cost" basis. Nor can the five-year delay in eligibility be rationalized as an objective test of residency in light of the provision's twin requirement of permanent residence status which, however it may constitutionally be defined, provides just such a test. Lastly, it suffices to note that the possibility of fraudulent receipt of benefits from more than one jurisdiction is here inoperative, as is any legislative purpose to encourage the entry of retirement-age aliens into the labor force. For these reasons we must conclude that the classification created by application of the residency requirement to aliens, but not to citizens, is invidiously discriminatory as a means to accomplish these arguably valid legislative purposes.

Defendant has advanced no other theory to justify the durational residency requirement, and we can conceive of none. We therefore decide that the five-year residency requirement for alien eligibility for supplemental medical insurance benefits violates equal protection notions in-

[13] *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969).

herent in fifth amendment due process. To grant relief to plaintiff Espinoza and the sub-class of those with permanent residence status which he represents, we need continue no further.

SEPARABILITY

Yet plaintiffs Diaz and Clara urge on behalf of the class herein certified that we proceed to examine the constitutionality of the requirement of permanent residence status. We have no occasion to consider this second aspect of the alien eligibility provision, however, because its permanent residence language cannot, in our view, be severed from the durational residency requirement.[14]

The very wording of the twin residency requirements suggests that Congress may not have intended that they be separable.[15] Moreover, the legislative history of the alien eligibility provision for supplemental medical insurance is devoid of evidence of Congressional intent to treat its twin requirements as severable ones.[16] Nor is

[14] Although for this reason we need not consider *Asensio* v. *Richardson, Civil* No. 71-1446, [1972 Transfer Binder] CCH Medicare & Medicaid Guide ¶ 26,475, at 10,242-44 (S.D. Fla. May 2, 1972), we note that our decision here is not inconsistent with that case because the ruling there concerned a deported nonimmigrant who had no reasonable expectation of remaining in the United States for other than a "temporary period of time." *Id.* at 10,244; *see* note 5 *supra*.

[15] If the phrases were linked by a conjunction such as "and" or "or," rather than by the relative pronoun "who," we would be less hesitant than we are to conclude that Congress intended them to be separable.

[16] Although Section 1836 of H.R. 6675 contained no durational residency requirement when initially considered and passed by the House on April 8, 1965, 111 Cong. Rec. 7444 (1965), such a provision was an integral part of the bill which received Senate approval. However, no clear manifestation of Congressional intent about separability is evident in the report of the Senate Finance Committee where, in closed session, the alien eligibility language of H.R. 6675 attained its present form. S. Rep. No. 404, 89th Cong., 1st Sess., pt. 2 at 483 (1965), *in* Senate Reports, Miscellaneous Reports on Public Bills III (GPO 1965). Although the alien eligibility provision is once paraphrased disjunctively in the explanatory section of the Senate report, S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1 at 70 (1965), *in* U.S. Code Cong. & Ad. News 2011 (1965), that document elsewhere consistently traces the exact language of the amended provision. S.Rep. No. 404, pt. 1, *supra* at 39, 170, *in* U.S. Code Cong. & Ad. News, *supra* at 1980, 2109. No instructive discussion of severability occurred on the Senate floor because the eligibility provision was submitted as one of several technical amendments at the start of debate, 111 Cong. Rec. 15613 (1965), and was accepted without separate consideration. 111 Cong. Rec. 15609 (1965).

guidance provided by the history of any other provision of the 1965 Amendments.[17] If similar requirements in subsequent laws are not uninstructive,[18] no prior social

[17] Although Section 103(a)(4) of H.R. 6675 contained, in its final form, an identical alien eligibility provision for the Medicare hospital insurance plan, its legislative history is no more illuminating on the separability question. As it initially passed the House, that provision contained a 10-year residency requirement, but no permanent residence component. H.Rep. No. 682, 89th Cong., 1st Sess. 39 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233 (1965). The permanent residence language first appeared after amendment of H.R. 6675 by the Senate Finance Committee in closed session. S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1 at 194 (1965), *in* U.S. Code Cong. & Ad. News 2134 (1965). Despite a paraphrase in disjunctive form in the Senate report, S.Rep. No. 404, pt. 1, *supra* at 25, *in* U.S. Code Cong. & Ad. News, *supra* at 1961, the explanatory material more often follows the exact language of the amended provision. S.Rep. No. 404, pt. 1, *supra* at 69, 194, *in* U.S. Code Cong. & Ad. News, *supra* at 2007, 2134 (1965).

[18] *See* 42 U.S.C. § 1382c(a)(1)(B)(ii) (Supp. II, 1973); 42 U.S.C. § 428(a)(3)(B) (1970). We think it significant that the most recent expression of the will of Congress on eligibility for social benefits makes special provision for parolees and conditional entrants to insure their inclusion as individuals eligible for aid to the aged, blind and disabled. This eligibility test abandons the durational residency requirement for aliens, and its permanent residence provision contains a new exception. Benefits are made available to an otherwise qualified individual who is:

> "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law* (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act).

42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973) (emphasis added).

benefit legislation contains such a provision.[19] And even though administrative practice may sometimes be persuasive evidence of legislative intent, *e.g. Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), it is of little assistance here.[20]

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[19] A key word computer search of all but Title 8 of the 1970 edition of the *United States Code* which focused on the terms "alien" and "eligible" and varients thereon failed to reveal the existence of any pre-1965 legislative provision then in force that links permanent residence and durational residency elements. *But cf.* 8 U.S.C. § 1427(a) (1970). The court acknowledges with appreciation the help in resolving this question provided by the Office of Computer Services in the Administrative Division of the Department of Justice, and of JURIS, the Justice Retrieval and Inquiry System.

[20] The Social Security Administration, charged with implementing the Medicare programs, has issued an interpretation of the alien eligibility requirement which leaves the separability issue in doubt:

> "An individual who is age 65 or over is eligible for enrollment in the supplementary medical insurance plan . . . if:
>
> * * *
>
> "(c) He is an alien lawfully admitted for permanent residence, *who* is a resident of the United States *and who* has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment."

20 C.F.R. § 405.206 (Supp. 1972). It may be that in practice some applications for enrollment are rejected solely for failure to meet one part of the residency requirement or the other, *see* note 6 *supra*, as were those of plaintiffs Diaz and Clara for inadequate length of residence. Their rejection notices, which followed what appears to be a standard format, stated:

> "*You* are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. *A person* not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance." (Emphasis added.)

We think such evidence of administrative interpretation too inconclusive to be entitled to great deference.

The most reliable indication of Congressional intent appears in the report of the House delegation to the conference committee, which reveals that unification of the two residency elements was an integral part of the larger compromise necessary to the final passage of the 1965 Medicare Amendments.[21] Although we recognize

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[21] The legislative history of the alien eligibility provision as finally enacted demonstrates that it was a product of compromise. Neither House simply "receded" before the wishes of the other. The report submitted to the House on H.R. 6675 by that Chamber's conferees indicates that the differences between the two Houses over the alien eligibility provision in Sction 1836 of the bill for the part B supplemental medical insurance plan were not considered in isolation, but jointly with like disagreements over the eligibility provision for the part A hospital insurance plan in Section 103 (a)(4). H.Rep. No. 682, 89th Cong., 1st Sess. 39-40 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233-34 (1965). The house bill initially contained only a requirement of permanent residence status for part B, and only a 10-year residency provision for Part A. The Senate incorporated a 10-year residency provision into part B, and a requirement of permanent residence status into part A, while shortening the original 10-year residency provision of part A to six months. The conference committee compromise package integrated the permanent residence requirement with a five-year residency provision, and imposed the resulting unified eligibility requirement on both the part A hospital insurance and part B supplemental medical insurance plans.

It may well be, as the government suggests, that the terms of the compromise were adapted from the residence requirement for naturalization contained in Section 316(a) of the Immigration and Nationality Act of 1952, which provides in pertinent part:

> "No person . . . shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totalling at least half of that time . . . ."

8 U.S.C. § 1427(a) (1970). Yet if this not unlikely hypothesis could be confirmed, the fact that the twin elements of the supplemental insurance plan's eligibility provision were both borrowed from the naturalization statute would, of itself, provide weighty evidence that Congress did not intend them to be separable. Perhaps more persuasive evidence for the same conclusion is provided by the difficulties that would be inherent in rescuing the permanent residence language of § 316(a) if its five-year residency provision

that reasonable men might differ on this question, we think the closely interwoven compromise language of the eligibility requirement's twin residency aspects rebuts any lingering presumption of separability from the general savings clause of the Social Security Act,[22] and that the entire provision must stand or fall as an entity.[23]

CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, we hold the entirety of the alien eligibility requirement of 42 U.S.C. § 1395o(2)(A)(ii) (1970) unconstitutional as a denial of fifth amendment due process. We therefore permanently enjoin the de-

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were stricken. But whatever the case, pragmatic compromise or adaptation, the evidence points to the conclusion that Congress intended no separability of the twin requirements of the alien eligibility provision.

[22] Section 1103 of the Social Security Act of 1935 provides:

> "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby."

42 U.S.C. § 1303 (1970).

[23] The touchstone of separability is, of course, Congressional intent. For this reason, the Supreme Court recently observed:

> "[W]hatever relevance such an explicit [severability] clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause."

United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (citations omitted). We have serious doubts, for the reasons stated, that Congress would have enacted the permanent residence language by itself, and we are not without reservations about the constitutionality of that aspect of the residency requirement. Particularly in view of the possibility that Congress adapted the alien eligibility provision from the prerequisits for naturalization, *see* note 21 *supra*, we think it evident that the twin requiremnets are not sufficiently independent that "the valid part may be dropped [because] what is left is fully operative as a law." *Id.* at 585, *quoting* Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

fendant Secretary from this day forward from relying on that provision to deny enrollment in the Medicare supplemental insurance plan, 42 U.S.C. § 1395j *et seq.* (1970), not only to plaintiff Espinoza and the sub-class he represents, but also to plaintiffs Diaz and Clara and the class herein certified.

The fact that it was unnecessary to reach the issue posed by the permanent residence requirement does not mean that we entertain no doubts about its constitutionality. Although the phrase may appear on its face to be a legitimate extension of the Congressional power to regulate entry into the United States, in actuality it may simply duplicate the immigration laws which screen out potential immigrants likely to become public charges.[24] Moreover, if its efficacy as a deterrent is subject to question, so too is the rationality of its scope as a means to achieve the legislative purposes the government has here advanced in defense of the entire alien eligibility provision.

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[24] For a brief summary of the provisions of the Immigration and Nationality Act which operate to exclude and remove immigrant aliens likely to become, or who do become, public charges, see Graham v. Richardson, 403 U.S. 365, 377 (1971). These provisions apply not only to immigrants, but also to nonimmigrants, unless waived by the Attorney General. 8 U.S.C. §§ 1182(a), 1184(a) (1970); 8 C.F.R. § 214.1(a) (Supp. 1973). Although parolees and conditional entrants may arrive in the United States without first meeting these self-support admission standards, 8 U.S.C. §§ 1153(a)(7), 1182(d)(5) (1970); 8 C.F.R. § 212.5(a) (Supp. 1973), parole is subject to revocation at any time at the Attorney General's discretion. Parolees who seek adjustments of status to that of permanent residence either to obtain greater security or to become eligible for naturalization must meet the standard admission requirements, including those of financial self-support. Act of Nov. 2, 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970); 8 U.S.C. §§ 1182(a), 1255(a) (1970). It is mandatory that conditional entrants who have not acquired permanent residence status after residing in the United States for two years be examined to determine whether they meet the financial requirements for admission or must be deported. 8 U.S.C. § 1153(g) (1970). Likewise, nonimmigrants who seek adjustments of status to that of permanent residence must meet the prerequisites for admission, incuding those of self-support. 8 U.S.C. § 1255(a) (1970).

Neither can we ignore the fact that to uphold the requirement of permanent residence status would be to work a fundamental injustice in that a major part of the relief contemplated by this decision would thereby be rendered a nullity. Plaintiffs Diaz and Clara and the not insubstantial class they represent would be barred from eligibility for supplemental medical benefits for all but about a year prior to becoming eligible for benefits as citizens.[25]

America once held her arms open wide, beckoning other lands to "[g]ive me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shores . . . ." [26] Although it may be, as some cynics have remarked, that that is exactly what she got, to the extent this nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens.

DONE and ORDERED in chambers at the United States Courthouse in Miami, Florida, this 11th day of June, 1973.

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

[25] *See* notes 6 & 21 *supra*.

[26] E. Lazarus, "The New Colossus" (1883).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER GRANTING MOTION FOR STAY
[Filed June 21, 1973]

A Motion for Stay having come before this Court on the petition of the defendant, United States of America, and the Court having reviewed its file and being fully informed in the premises, it is hereby

ORDERED AND ADJUDGED that the defendant's Motion for Stay is hereby granted for a period of fifty (50) days.

DONE AND ORDERED in Chambers in Miami, Florida, this 21 day of June, 1973.

/s/ Joe Eaton
United States District Judge
[For James Lawrence King,
District Judge]

cc: U. S. Attorney (Ray)
Alfred Feinberg, Esq., Legal Services
of Greater Miami, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER VACATING STAY AND ENTERING FINAL JUDGMENT

This action came on before the court upon plaintiffs' motion to vacate the stay entered by the court on June 21, 1973, and upon defendant's motion for entry of final judgment. The court, having considered the motions, having reviewed the record, and being fully advised in the premises, finds and concludes that both motions should be granted.

By memorandum opinion issued June 11, 1973, the court granted plaintiffs' motion for summary judgment and its request for declaratory and injunctive relief. On the ninth day thereafter defendant filed a motion for stay of the interlocutory ruling. The motion represented, contrary to the provisions of Fed. R. Civ. P. 62(a) that the court's ruling had automatically been stayed for 10 days. It requested an additional 50-day stay for the duration of a 60-day period claimed by defendant in which to file its appeal, the provisions of 28 U.S.C. § 2101(a) notwithstanding. In the absence of the judge given primary responsibility for this case by the three-judge panel, the stay order presented for signature by defendant was signed by another panel member in chambers to prevent prejudice to the government, given the apparent emergency nature of what was represented to be a last-minute motion. But because the requirements of Fed. R. Civ. P. 62(c) had been overlooked by defendant when it drafted an order for signature in chambers by a single judge, the stay is invalid and plaintiff's motion must be granted.

Nonetheless, defendant has had almost two months in the interim to determine whether to appeal the court's ruling. We concur in the judgment that a short stay during which the government might determine whether to appeal and make preparations to comply with our ruling was appropriate in view of the impact of our decision, and would have approved a proper order for this purpose at the proper time. We cannot ignore, however, the daily

detriment suffered by plaintiffs and members of the class and sub-class certified by virtue of their exclusion from enrollment in the supplemental medical insurance program under part B of Medicare. Believing that our decision was right, we conclude on balance that no further stays of our ruling would be appropriate in the absence of any stronger showing of irreparable harm to defendant than has been made. Moreover, we note that in moving for entry of final judgment defendant has requested no further stay, despite the fact that a final order will take effect immediately pursuant to Fed. R. Civ. P. 62(a). An appropriate period having passed during which defendant could prepare to comply with our ruling (and did so prepare, according to defendant's memorandum in support of its motion for stay), we will grant the government's motion for entry of final judgment at this time. Therefore it is,

ORDERED and ADJUDGED that plaintiffs' motion to vacate the stay entered by the court on June 21, 1973, be and the same is hereby granted; it is further

ORDERED and ADJUDGED that the stay entered by the court on June 21, 1973, be and the same is hereby vacated; it is further

ORDERED and ADJUDGED that defendant's motion for entry of final judgment be and the same is hereby granted.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida, this 7th day of August, 1973.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

FINAL JUDGMENT
[Filed August 7, 1973]

This action having come before the court on opposing motions for summary judgment, and the court having heard oral argument, considered the entirety of the record, and being fully advised in the premises, it is,

ORDERED that plaintiffs' motion for summary judgment and their prayer for final declaratory and injunctive relief on behalf of themselves and the class and subclass certified is hereby granted and defendant's motion for summary judgment is hereby denied in accordance with the court's memorandum opinion of June 11, 1973, and for the reasons set forth therein.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this —— day of August, 1973.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER DENYING STAY PENDING APPEAL
[Filed August 21, 1973]

This action came on before the court upon defendant's motion for issuance of a stay pending appeal. The court, having considered the motion, the emendation to it, the response and the record herein, finds and concludes that the motion should be denied. By order of August 7, 1973, this court observed that "no further stays of our ruling would be appropriate in the absence of any stronger showing of irreparable harm to defendant than has been made." Rather than seeking to present a more detailed showing of the scope and extent of the harm which defendant has or expects to suffer, defendant's present motion simply reiterates the assumption that "this court's decision will severely disrupt the government's administration of the medicare supplementary insurance program." Essentially the same assertion had been advanced by the government in its initial motion for stay filed June 20, 1973.

Neither at that time nor in its most recent motion has the defendant moved for a hearing at which it might argue or develop evidence of the "severe disruption" which it contends implementation or our ruling will entail, despite the requirement of Local Rule 10(B) that a hearing, if desired, be requested. Nor have either of defendant's motions themselves detailed the irreparable harm asserted. Our decision was purposefully a rather narrow one, which carefully read should not have the "far reaching effects" about which defendant has expressed alarm but has not detailed. For these reasons, and the reasons set forth in our order of August 7, 1973, we continue to believe that on balance no further stays of our ruling are appropriate. Therefore it is,

ORDERED and ADJUDGED that defendant's motion for stay pending appeal to the United States Supreme Court be and the same is hereby denied.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 17th day of August, 1973.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-1312-Civ-JLK

SANTIAGO DIAZ, JOSE A. CLARA, and VICTOR CARLOS ESPINOSA, PLAINTIFFS

vs.

CASPAR W. WEINBERGER, as Secretary of the Department of Health, Education and Welfare of the United States, DEFENDANT

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, UNITED STATES OF AMERICA, appeals to the United States Supreme Court from the Final Judgment and from the Order dated August 7, 1973, entered by the Honorable David W. Dyer, United States Circuit Judge, the Honorable Joe Eaton, United States District Judge, and the Honorable James Lawrence King, United States District Judge.

ROBERT W. RUST
United States Attorney

By: /s/ Mervyn L. Ames
MERVYN L. AMES
Assistant U.S. Attorney
300 Ainsley Bldg.
Miami, Florida 33132
Tele: 305-350-4471

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal was this 5th day of September, 1973, mailed to Alfred Feinberg, Esq., Legal Services of Greater Miami, Inc., 395 Northwest 1st Street, Suite 202, Miami, Florida.

/s/ Mervyn L. Ames
MERVYN L. AMES

Copies to: Alfred Feinberg
USCA
Ct. Rep.
Judge Dyer
Judge Eaton

SUPREME COURT OF THE UNITED STATES

No. 73-1046

CASPAR W. WEINBERGER, Secretary of the Department of Health, Education and Welfare, APPELLANT

v.

SANTIAGO DIAZ, et al.

APPEAL from the United States District Court for the Southern District of Florida.

The statement of jurisdiction having been submitted in this case and considered by the Court, probable jurisdiction is noted.

May 13, 1974

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